**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| SHU-CHIN WANG and WEN-SHYAN WANG, husband and wife; and MOUNTLAKE INVESTMENT, LLC, a Washington limited liability company,<br><br>Appellants,<br><br>v.<br><br>KIDDER, MATHEWS & SEGNER, INC., a Washington corporation d/b/a GVA KIDDER MATHEWS; JASON M. ROSAUER and ANNE M. MARKLEY, husband and wife, and their marital community,<br><br>Defendants,<br><br>BUSINESS PLANS & STRATEGIES, INC., a Washington corporation; and ROSE M. CHISHOLM and TONY CHISHOLM, husband and wife, and their marital community,<br><br>Respondents. | ) | NO. 62034-7-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: August 23, 2010 |

Leach, A.C.J. — Appellants Shu-Chin Wang, Wen-Shyan Wang, and Mountlake Investment, LLC (collectively Wang)[1] sued respondents Business Plans & Strategies, Inc., Rose M. and Tony Chisholm (collectively BPS),[2] and

[1] Because Ms. Wang was the principal participant in the real estate transaction, we use the feminine pronoun throughout when referring to appellants.

[2] While the Chisholms are not parties to the contract in dispute, Wang

other defendants after learning that the commercial property she purchased needed more than an estimated $1,000,000 in repairs. On appeal, she alleges that BPS breached its implied covenant of good faith and fair dealing by not delivering to her every building inspection report and repair bid in its possession during the feasibility contingency period. She also claims that the trial court erred when it dismissed her fraudulent concealment claim, admitted expert testimony on industry custom, instructed the jury, and denied her motion for a new trial. Finally, she challenges the trial court's award of attorney fees to BPS.

Her arguments lack merit. Wang's breach of contract claim fails because BPS did not agree to deliver all the documents in its possession during the feasibility contingency period. Her fraudulent concealment claim fails because she did not show that a reasonably diligent inspection would not have disclosed the building's defects. Some of the admitted expert testimony aided the jury in understanding a matter beyond its common experience. Wang failed to timely object to the balance. Her challenges to the trial court's jury instructions fail because the instructions contained no error, any potential error was harmless, or she failed to support the alleged error with argument. The parties' contract entitles BPS, as the prevailing party, to an award of fees. Because Wang demonstrates no basis for reversal, we affirm.

FACTS

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has asserted her contract claims against them as well, both in the trial court and on appeal.

Rose and Tony Chisholm purchased a building in Mountlake Terrace through their corporation, Business Plans & Strategies, Inc., in late 2001. This three-story building, built in 1987, was clad with an exterior insulating and finishing system (EIFS). Any water penetration through the waterproof membrane of EIFS sheathing leaves any wood structural components vulnerable to decay.

Beginning in 2002, BPS made numerous attempts to repair damage from water intrusion into the building. In the spring of 2005, BPS listed the building for sale for $5.2 million with Jason Rosauer of Kidder Mathews and Segner, Inc., d/b/a GVA Kidder Mathews (GVAKM). In the fall of 2005, BPS transferred management of the building to Earl Wayman of GVAKM. Wayman hired Eastside Glass to conduct an inspection of the building's siding. Eastside Glass discovered multiple failures in the EIFS cladding and recommended that an EIFS contractor perform the necessary repairs.

GVAKM obtained repair bids from two companies, Tatley-Grund, Inc., and DOM Construction, Inc. Tatley-Grund recommended a full strip and reclad of the building's envelope at an estimated cost of $600,000 to $650,000, depending on the materials used. DOM also recommended a complete removal and replacement of the EIFS cladding. The DOM bid, however, recommended less expensive material than the Tatley-Grund bid at an estimated cost of $175,000. The bid expressly stated that it "d[id] not include any structural damage repairs."

In the spring of 2006, BPS relisted the building for $4.475 million, and

Rosauer posted "due diligence materials" on GVAKM's web site. Accessing these materials required the prospective purchaser to agree to a confidentiality agreement. The agreement provided that

> [the listing materials] do[] not purport to be all-inclusive or to contain all the information which a prospective purchaser may desire. Neither GVAKM nor Owner make any representation or warranty, expressed or implied, as to the accuracy or completeness of the Confidential Information and no legal liability is assumed or to be implied with respect thereto.

A viewer gained access to the posted materials by clicking "I agree" at the bottom of the screen. The posting informed the prospective purchaser that the

> siding on the building needs to be replaced. It needs to be stripped and reapplied in order to maintain the structural integrity of the building. Sell[er] will consider offers that include an escrow holdback of up to $180,000 at Closing, in order to correct this defect. Please view the cost estimate of repair under the "Additional Information" section of this website.

The "Additional Information" section identified the DOM bid as the estimate for repair costs.

Wang had purchased two commercial buildings before this transaction. Doug Plager was the leasing agent for these buildings. Because Wang wished to acquire additional property, he forwarded to Ms. Wang an e-mail he received for the BPS building with a link to the GVAKM web site. On June 6, both Plager and Wang accessed this web site and agreed to the confidentiality agreement by clicking "I agree." After reviewing the posted materials, Wang decided that the building looked like a promising investment and arranged to tour the property. On June 9, she made an offer to purchase the building for $4.4 million with a

proposed $300,000 holdback "to cover the costs of siding replacement and possible damages, as yet undiscovered, to the structure [of] the building."

BPS counteroffered, and on June 19 the parties entered into a purchase and sale agreement (PSA) in which Wang expressly "acknowledge[d] Seller Disclosure of EIFS siding decay on the building, and the purchase price reflects any damage or expense arising therefrom." The parties agreed to a purchase price of $4.225 million, $175,000 less than Wang's original offer.

The parties used forms published by the Commercial Brokers Association (CBA) for their PSA. Paragraph 5 of the agreement established a 30-day feasibility contingency period for Wang to ascertain her satisfaction, in her sole discretion, with "all aspects of the Property." The sale terminated unless Wang provided BPS with written notice of her satisfaction with the property or waived the feasibility contingency. Subparagraph 5(a) required BPS to "make available for inspection . . . all documents in [BPS's] possession or control relating to the ownership, operation, renovation or development of the Property" within five days. Paragraph 12 listed BPS's representations to Wang, including the representation in 12(b) that except

> as disclosed to . . . Buyer prior to the satisfaction or waiver of the feasibility contingency stated in Section 5 above, including in the books records and documents made available to Buyer, . . . [t]he books, records, leases, agreements and other items delivered to buyer pursuant to this Agreement comprise all material documents in Seller's possession or control regarding the operation and condition of the Property.

In paragraph 12(h), BPS represented that, except for those defects disclosed to

Wang during the feasibility contingency period, it was "not aware of any concealed material defects in the Property."

On June 21, 2006, Plager picked up from Rosauer a copy of the documents posted on the GVAKM web site. To acknowledge the delivery, Plager signed a receipt that read, "Per paragraph #5a of the Purchase and Sale Agreement between Shuchin Wang and [BPS], dated 06-19-2006, please sign for receipt of Seller's due diligence materials, books and records and a full plan set for the subject offering."

On June 23, Seattle/Eastside Building Inspections, Inc. (SEBI) conducted for Wang a visual inspection of the premises. SEBI's inspection report recommended further investigation because of possible hidden damage.

> The wall cladding consists, primarily of an Exterior Insulated Finish System or "EIFS". There are several repairs to this material, most of which are not professional quality. There are numerous visible areas of accidental or bird caused damage and there are some indications of possible hidden damage. All of these problems or potential problems warrant more extensive and most likely destructive further investigation. As both the investigation as well as proper repairs will be expensive, it is strongly recommended that the former take place prior to closing so that an accurate estimate of repair costs can be obtained.

And,

> [T]wo areas are of major concern, especially given the probability that there could be hidden damage. These areas are the Exterior Insulation and Finish System or "EIFS" wall cladding and the roof. Both of these warrant further, and possibly destructive examination. In both cases repairs are likely to be costly and it is strongly recommended that such examinations be conducted prior to closing.

Wang, however, decided to waive the feasibility contingency without any further investigation.

After signing the contract with BPS, she formed Mountlake Investments, LLC, and assigned her rights under the PSA to it. The sale closed on July 31. On August 3, Plager picked up at GVAKM's property management office all the building documents in GVAKM's possession. These documents included the Eastside Glass and Tatley-Grund reports, which Wang saw then for the first time.

In November 2006, Wang commenced this lawsuit against the Chisholms, BPS, Rosauer and his wife, and GVAKM, alleging negligent or intentional misrepresentation, breach of contract, fraudulent concealment, fraud, and Consumer Protection Act violations. She sought direct and consequential economic damages, repair expenses, expectation damages, and other special damages in excess of $1,000,000, in an amount to be proved at trial.

In July 2007, Wang hired J2 Building Consultants, Inc. (J2) to conduct a more thorough investigation. J2's report stated,

> J2's invasive inspection, which reviewed existing openings as well as new, revealed that the EIFS was improperly installed and improperly maintained, and that the windows and other penetrations (such as vents) were also leaking. This water intrusion has led to such extensive decay that immediate shoring and repairs were necessary to prevent collapse on the South and East sides. These types of damages or defects could not be assessed without destructive (invasive) type testing.

J2 projected repair costs exceeding $1.2 million.

In January 2008, the trial court granted partial summary judgment, dismissing the misrepresentation claims against BPS; the breach of contract claim against GVAKM, the Rosauers, and the Chisholms; and the fraudulent concealment and Consumer Protection Act claims against each of the defendants. The case proceeded to trial on the misrepresentation claim against GVAKM, the Rosauers, and the Chisholms and on the breach of contract claim against BPS.

During trial, the court ruled that Arvin Vander Veen, an expert witness for the defense, could testify about industry custom regarding the seller's disclosure obligations under the CBA form contract. He then testified with respect to paragraph 5(a) of the form contract,

> The industry practice is that I [as the seller's agent] would find out from the seller what all the pertinent documents are. . . . I would find out where they're physically located, and if they're all arranged, then I would -- I would work with the agent for the buyers if they have an agent, and arrange a time that they can go to the seller's, let's say, office for lack of better terms and take their time to go through all those documents that come under the due diligence or feasibility study paragraph.

When asked about the relationship between paragraph 5(a) and 12(b), he testified that "[i]t just means that all the documents that are available . . . to this buyer in this specific physical location, those are all the documents that the seller has, there's none at home in the bottom desk drawer, they are all right there." On redirect, he opined that BPS complied with its disclosure obligations under paragraphs 5(a), 12(b), and 12(h) by making all the reports and repair

bids available at its property manager's office.

After the parties rested, the court dismissed the remaining misrepresentation claims, finding that the economic loss rule barred recovery. The court advised the jury of the dismissal of these claims with a jury instruction.

The jury returned a verdict in favor of BPS. The trial court denied Wang's motion for a new trial. It also awarded defendants BPS and Chisholms, jointly, $153,065.36 in attorney fees and costs. Wang appeals.

ANALYSIS

*Breach of Contractual Duties of Good Faith and Fair Dealing*

Wang contends that BPS breached its duty to contract fairly and in good faith when it failed to deliver the Tatley-Grund inspection report and estimate together with the much lower DOM bid. She claims that this omission undermined her contractual rights under the feasibility contingency and deprived her of the benefits of the seller's representations in paragraph 12 of the PSA. We disagree.–

Wang has not explained how this alleged breach relates to any of her assignments of error. We generally do not consider argument unsupported by an assignment of error.[3] Although this alleged contractual breach is not properly presented for appellate review, we address it because many of Wang's additional arguments rely to some extent on it.

[3] RAP 10.3(a)(4), 10.3(a)(6); Rutter v. Rutter's Estate, 59 Wn.2d 781, 787-88, 370 P.2d 862 (1962).

The implied covenant of good faith and fair dealing "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance."[4] This duty, however, "exists only 'in relation to performance of a specific contract term.'"[5] In other words, it does not "'inject substantive terms into the parties' contract.' . . . [I]t requires only that the parties perform in good faith the obligations imposed by their agreement."[6] Thus, Wang must demonstrate that the PSA required BPS to "deliver" the Tatley-Grund report and bid.

We interpret the meaning of unambiguous contract terms as a matter of law.[7] Under these circumstances, we consider only what the parties wrote, giving words in a contract their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates a contrary intent.[8]

Under paragraph 5, the agreement expires 30 days after mutual acceptance unless the buyer gives the seller written notice that the buyer is satisfied with "all aspects of the Property, including its physical condition."

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[4] Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

[5] Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177, 94 P.3d 945 (2004)(quoting Badgett, 116 Wn.2d at 570); see also Frank Coluccio Constr. Co. v. King County, 136 Wn. App. 751, 766, 150 P.3d 1147 (2007) (county breached implied covenant of good faith by failing to procure all-risk builder's risk insurance as required by contract).

[6] Badgett, 116 Wn.2d at 569 (quoting Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wn. App. 630, 636 n.6, 700 P.2d 338 (1985)).

[7] Language Connection, LLC v. Employment Sec. Dep't, 149 Wn. App. 575, 585, 205 P.3d 924 (2009).–

[8] Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Subparagraph 5(a) dictates that the "Seller shall make available for inspection by Buyer and its agents within 5 days . . . after Mutual Acceptance all documents in Seller's possession or control." (Emphasis added.) The relevant representations in paragraph 12 provide,

> **SELLER'S REPRESENTATIONS**. Except as disclosed to or known by Buyer prior to the satisfaction or waiver of the feasibility contingency stated in Section 5 above, including . . . documents made available to Buyer, . . . Seller represents to Buyer that, to the best of Seller's actual knowledge, each of the following selected paragraphs is true as of the date hereof:
> . . . .
>
> b. The books, records, leases, agreements and other items delivered to Buyer pursuant to this Agreement comprise all material documents in Seller's possession or control.
> . . . .
>
> h. Seller is not aware of any concealed material defects in the Property except as disclosed to Buyer in writing during the Feasibility Period.

(Emphasis added.)

The PSA is unambiguous. A promise to make documents available for inspection and a promise to deliver these documents are very different promises. As the trial court instructed, "'[M]ake available' means only that the subject matter is accessible or attainable [while] 'deliver' means delivery or physical transfer of possession."[9] Notably, the word "deliver" does not appear in paragraph 5(a). With this paragraph BPS only agreed to "make available for inspection," not "deliver," all material documents relating to the property within the first five days of the feasibility period. The warranties in paragraph 12 did

[9] Wang does not challenge this instruction on appeal.

not change this promise.

The introductory language of paragraph 12 and the language of paragraph 12(b) together simply mean that the items delivered to Wang are considered to include all the "books," "records" and "documents" made available for her inspection, including those made available pursuant to the obligations imposed upon BPS by paragraph 5. BPS's actual delivery, upon request, of the materials posted on its web site neither altered its obligation under paragraph 5 to make documents available for Wang's inspection nor gave rise to any greater duty to deliver additional documents to Wang pursuant to paragraph 12(b).

Paragraph 12(h) is a representation by BPS that it is unaware of any concealed defect not otherwise disclosed to buyer in writing during the feasibility period. A defect was disclosed in writing if it was described in a document made available for inspection pursuant to paragraph 5. Wang's argument would insert additional substantive terms into the agreement to which the parties did not agree. This we will not do.

In short, Wang relies on a nonexistent contractual obligation to deliver documents in BPS's possession or control to support her claim that BPS breached its duty to contract fairly and in good faith. Since this reliance is misplaced, her argument fails as a matter of law.

*Summary Judgment of Fraudulent Concealment Claim*

Next, Wang asserts that the trial court erred in dismissing on summary judgment her fraudulent concealment claim. Specifically, she alleges that the

reasonableness of her failure to discover the extent of structural damage in light of BPS's limited disclosures in the posted materials presented a material issue of fact. Wang is wrong.

We review an order granting summary judgment de novo, engaging in the same inquiry as the trial court.[10] On summary judgment, the moving party bears the initial burden of showing the absence of a genuine issue of material fact,[11] which can be met by showing that there is an absence of evidence supporting an element of the nonmoving party's case.[12] The burden then shifts to the nonmoving party to make a showing sufficient to establish the existence of the element for which that party carries the burden of proof at trial.[13] Summary judgment is appropriate if the nonmoving party fails to meet this burden—a failure of proof on an essential element of that party's case renders all other facts immaterial.[14]

[10] Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000).
[11] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).
[12] White v. Kent Med. Ctr., Inc., 61 Wn. App. 163, 170, 810 P.2d 4 (1991).
[13] White, 61 Wn. App. at 171.
[14] Miller v. Likins, 109 Wn. App. 140, 145, 34 P.3d 835 (2001).

Washington courts have not recognized a general requirement to disclose all material facts in arm's length business transactions.[15] Nevertheless, a general contractual duty to act in good faith may give rise to a duty to disclose. In Obde v. Schlemeyer[16] and similar cases,[17] our Supreme Court announced that a vendor's failure to disclose is actionable where there is a concealed defect that presents a danger to property, health, or life of the purchaser; the vendor had knowledge of the defect; the purchaser lacked knowledge of the defect; and the defect would not have been disclosed by a careful, reasonable inspection.[18] The definitive issue here is whether Wang met her burden to show that the building defects would not have been discovered during a reasonably diligent inspection.

In Puget Sound Service Corp. v. Dalarna Management Corp.,[19] the purchaser of an apartment building accused the seller of constructive fraud for failing to disclose "substantial, chronic, and unresolved water leakage problems" before the sale. We were not persuaded that the nondisclosure constituted a species of fraud, however, as the buyer's own inspection report disclosed readily

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[15] Puget Sound Serv. Corp. v. Dalarna Mgmt. Corp., 51 Wn. App. 209, 215, 752 P.2d 1353 (1988) (seller under no obligation to disclose its historical experience with defects); Liebergesell, v. Evans, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980) (observing that when parties are contracting at arm's length, there is no particular duty to disclose facts or right to rely on statements of other party).

[16] 56 Wn.2d 449, 452, 353 P.2d 672 (1960) (quoting Perkins v. Marsh, 179 Wash. 362, 365, 37 P.2d 689 (1934)).

[17] See Atherton Condo. Apartment–Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 524, 799 P.2d 250 (1990) (quoting Obde, 56 Wn.2d at 452); Alejandre v. Bull, 159 Wn.2d 674, 689, 153 P.3d 864 (2007).

[18] Alejandre, 159 Wn.2d at 689.

[19] 51 Wn. App. 209, 212, 752 P.2d 1353 (1988).

observable water leakage before closing. Instead, we held that where the buyer's inspection reveals some evidence of water penetration, the buyer must make additional inquiries of the seller, and the seller has no affirmative duty to report its experience with water penetration problems.[20]

And in Alejandre v. Bull,[21] our Supreme Court used a similar rationale to hold that the buyer's fraudulent concealment claim was foreclosed by the buyer's failure to prove that an unknown defect in a home's septic system would not have been disclosed by a careful, reasonable inspection. The court found persuasive the fact that the purchasers bought the home with an inspection report in hand disclosing that the report was incomplete and trial testimony showing that a reasonably careful and complete inspection would have uncovered the defect.[22]

Wang's case is weaker than that of the buyers in Dalarna and Alejandre. Wang reviewed materials that informed her that "[t]he siding on the building needs to be replaced. It needs to be stripped and reapplied in order to maintain the structural integrity of the building." BPS provided her with the DOM bid for removal of the existing exterior cladding and installation of a new fiber-cement siding system that expressly stated that "[it] d[id] not include any structural damage repairs." Wang procured the SEBI inspection report that described the defective EIFS sheathing, highlighted the probability of hidden damage, and

[20] Dalarna, 51 Wn. App. at 215.
[21] 159 Wn.2d 674, 689-90, 153 P.3d 864 (2007).
[22] Alejandre, 159 Wn.2d at 690.

recommended further investigation before closing. In the PSA, Wang affirmatively represented and warranted to BPS "that Buyer has sufficient experience and expertise such that it is reasonable for Buyer to rely on its own pre-closing inspections and investigations." Yet, Wang chose to close without pursuing the additional inspections recommended by SEBI and with knowledge that the only repair bid known to her expressly excluded the costs of structural damage. A postsale inspection for Wang disclosed the full extent of the damage.

These facts are uncontroverted. Wang, therefore, had ample notice of the siding failure and the need for further investigation to determine the full extent of damage caused by it. That further investigation would have disclosed the full extent of the building defects to Wang. As in Dalarna and Alejandre, Wang's claim fails because she did not show that the building's defects would not have been discovered through a careful, reasonable inspection.

Wang responds that BPS deliberately misrepresented a material fact by providing her with a copy of the DOM bid and not the Tatley-Grund report and bid. She claims that this partial disclosure caused her to not investigate further. Therefore, it is immaterial that a reasonable, careful investigation would have revealed the defect. We disagree for two reasons.

First, the record does not support her assertion that BPS deliberately misrepresented or concealed the full extent of the defects. The DOM bid suggested the possibility of structural damage by excluding structural repairs

from its scope. As discussed above, neither BPS's disclosure nor delivery of the DOM bid triggered a duty to deliver the Tatley-Grund report during the feasibility contingency period. Wang presented no evidence that the Tatley-Grund report and bid were unavailable for her inspection during this time. The web site confidentiality agreement she accepted expressly stated that the posted materials "d[id] not purport to be all-inclusive or to contain all the information which a prospective purchaser may desire." Additionally, in the PSA she expressly acknowledged the "Seller Disclosure of EIFS siding decay . . . and [that] the purchase price reflects any damage or expense arising therefrom." Accordingly, Wang failed to establish a genuine issue of material fact sufficient to defeat BPS's summary judgment motion.

Second, the cases she cites in support of her position—Boonstra v. Stevens-Norton, Inc.,[23] Liebergesell v. Evans,[24] Ikeda v. Curtis,[25] Sloan v. Thompson,[26]—are all factually distinguishable. In Boonstra and Liebergesell, a preexisting fiduciary or quasi-fiduciary relationship gave rise to a duty to speak.[27]

[23] 64 Wn.2d 621, 393 P.2d 287 (1964).
[24] 93 Wn.2d 881, 613 P.2d 1170 (1980).
[25] 43 Wn.2d 449, 261 P.2d 684 (1953).
[26] 128 Wn. App. 776, 115 P.3d 1009 (2005).
[27] Boonstra, 64 Wn.2d at 625 (a broker was found liable for failing to tell an investor that a proposed investment was encumbered because the broker's superior business acumen, experience, and awareness of investor's reliance on this experience and judgment gave rise to quasi-fiduciary or fiduciary relationship); Liebergesell, 93 Wn.2d at 888, 890-91 (a broker may be estopped from asserting a usury defense after enticing the lender to agree to illegal loans because a fiduciary or quasi-fiduciary relationship may have justified investor's reliance on broker).

In Ikeda, the defendant-seller lied about the source of income of a hotel.[28] And in Sloan, the home's defects were not discoverable by a careful, reasonable inspection.[29] None of these circumstances exist in this case: Wang does not claim that BPS owed her a fiduciary duty in this arm's length transaction,[30] she makes no claim that BPS affirmatively lied, and the SEBI report demonstrates that a careful reasonable investigation would have disclosed the full extent of the building's defects.

In conclusion, Wang's failure to present any evidence showing that the building's structural defects were not discoverable by a careful, reasonable inspection forecloses her fraudulent concealment claim. The trial court properly dismissed it.

*Expert Testimony*

Wang maintains that Vander Veen's expert testimony on industry custom regarding the terms "deliver" and "make available" in the PSA amounted to improper testimony on an issue of law with no relevance to any disputed factual issue. She also complains that admitting testimony that BPS met its "duty of

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[28] 43 Wn.2d at 459, 461 (liability for falsely telling buyer that hotel was primarily occupied by permanent guests when the income derived primarily from prostitution).

[29] 128 Wn. App. at 789-90 (the buyers presented uncontested expert testimony that the home's structural defects were undiscoverable by a careful, reasonable inspection).

[30] Nor would we be likely to find one as both parties had experience with commercial real estate transactions and Wang expressly warranted that she had "sufficient experience and expertise such that it is reasonable for Buyer to rely on its own pre-closing inspections and investigations."

care" by making the documents available for review allowed BPS to evade its implied covenant of good faith and fair dealing. Neither argument is persuasive.

ER 702 governs the admissibility of expert testimony and provides that this testimony may be admitted if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." If "'the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment,'" expert testimony is unnecessary and should be excluded.[31] At the same time, an expert's testimony in the form of an opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.[32] Admissibility of expert testimony lies largely within the discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion.[33] An abuse of discretion occurs when no reasonable person would take the position adopted by the trial court.[34]

Here, Wang moved in limine to exclude Vander Veen's testimony about industry custom regarding the disclosure provisions of paragraphs 5(a) and 12 of the PSA. The court reserved the issue for trial. Before Vander Veen testified, Wang again objected, arguing that

> he's going to be testifying as to the meaning of due diligence disclosures . . . . He is going to be testifying that the problems with the building were fully disclosed, which again, is opinion testimony

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[31] City of Seattle v. Personeus, 63 Wn. App. 461, 464, 819 P.2d 821 (1991) (quoting State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985)).

[32] ER 704.

[33] State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)

[34] State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

> on the meaning of the contract and the duty to disclose, which expert testimony is not needed on those issues. The jury has all the facts.

BPS's counsel responded that commercial real estate transactions are hardly matters of common knowledge, let alone industry custom regarding the operation of the terms "deliver" or "make available" in the PSA. The court agreed and ruled as follows,

> The Court will permit Mr. Vander Veen based on his experience to describe that experience and testify about the (sic) CBI Agreements and how at least in his opinion the terms are designed to operate and what in his opinion the reason for those terms being in these contracts. I think that . . . would be helpful to the jury in understanding the commercial setting here.
> . . . .
> I will allow him in effect to talk about, because I think it's in the context of explaining the contract terms, why in his opinion there was full disclosure of the problems with the building in this case.

The trial court did not abuse its discretion. Evidence is relevant when it has any tendency to prove or disprove any fact that is of consequence to the trial.[35] The central issue before the jury turned on BPS's disclosure obligations imposed by paragraphs 5 and 12 of the PSA. Therefore, the trial court reasonably decided to admit Vander Veen's testimony about trade practices with respect to these paragraphs as this testimony would assist the jury in understanding evidence germane to an important factual issue not otherwise within the jurors' common experience.

Contrary to Wang's argument, the trial court's ruling did not conflict with its jury instruction defining "make available" and "deliver." The instruction

[35] ER 401.

defined these terms as a matter of law, while Vander Veen's testimony about industry custom explained how each type of disclosure occurred in practice in the commercial real estate trade.

Wang's challenge to Vander Veen's testimony that BPS met its "duty of care" under the contract also fails, but for two different reasons.

First, she failed to preserve this issue for appellate review. To preserve an evidentiary issue for appellate review, the specific objection made at trial must be the basis of a party's assignment of error on appeal.[36] At trial, Wang objected to Vander Veen's testimony on the basis that it would not assist the jury on a relevant issue of fact, but on appeal she claims this testimony constitutes an inadmissible opinion about legal standards. Since the specific objection made at trial is not the basis for the alleged error on appeal, the issue has not been properly preserved for appellate review.[37]

Second, immediately after the court's initial ruling, a colloquy between Wang's counsel and the court took place wherein the trial court modified its initial ruling that Vander Veen could testify that BPS met its disclosure obligations.

> Counsel: Your Honor, if I may clarify . . . . You initially said that you would permit testimony on experience and on the (sic) CBI agreements. I assume you meant CBA agreement, the contract? And how they operate?
>
> Court: Yes.

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[36] State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).
[37] See Guloy, 104 Wn.2d at 422.

. . . .

> Counsel: Okay. And the due diligence is part of that opinion, is that included in that, too?
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> Court: The due diligence I am not sure just how that – if that's something that you can talk about somehow. I mean, we have facts as to what was disclosed and when and how. And I suppose he can refer back to what occurred. I can't go beyond – I mean, I will have to deal with this[] [a]s a specific objection at trial, but I think that that just has to do with the talking to the jury about how the contracts work and how is it that some things might be disclosed one way and others another way and the jury will ultimately have to determine whether that's consistent with the intentions of the parties in this case when they signed the contract.

(Emphasis added.) Despite this ruling, Wang failed to object when Vander Veen testified that BPS met its disclosure obligations.

When evidentiary decisions are made pursuant to motions in limine, the losing party is deemed to have a standing objection where a judge has made a final ruling on the motions.[38] If, however, the court makes a tentative ruling or, as in this case, indicates that a further objection at trial is required, "'the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.'"[39]

Here, the trial court initially reserved ruling on Wang's motion in limine for trial. At trial, the court ultimately ruled that it would deal with testimony about BPS's compliance with its disclosure duties with a specific objection lodged at the appropriate time. Wang failed to object to the question eliciting Vander

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[38] State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

[39] Powell, 126 Wn.2d at 256 (quoting State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989)).

Veen's testimony that BPS had met its disclosure obligations under the industry standard. By failing to object at this time, Wang waived her right to appeal the admission of Vander Veen's answer.

*Jury Instructions*

Wang also challenges various jury instructions, contending that the trial court erred by giving certain instructions and failing to give her proposed instructions. These challenges fail for the reasons explained below.

The test for assessing the sufficiency of a jury instruction is whether the instructions, when read as a whole, accurately state applicable law, do not mislead the jury, and permit each party to argue its theory of the case.[40] Even erroneous instructions do not warrant reversal unless the party asserting error meets its burden of establishing consequential prejudice.[41] Only errors prejudicial or presumptively prejudicial to the outcome of a trial warrant reversal.[42]

Wang first alleges that the trial court erred by giving jury instruction 6, which dealt in general terms with a corporation's vicarious liability for the acts and omissions of its agents and employees.[43] She further claims the trial court

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[40] Gammon v. Clark Equip. Co., 104 Wn. 2d 613, 617, 707 P.2d 685 (1985).

[41] Goodman v. Boeing Co., 75 Wn. App. 60, 68, 877 P.2d 703 (1994), aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995).

[42] Goodman, 75 Wn. App. at 68.

[43] Instruction 6 read, "The plaintiff Mountlake Investment, LLC, and the defendant, Business Plans & Strategies, Inc., are corporations. A corporation can act only through its officers, employees, and agents. Any act or omission of an officer, employee or agent is the act or omission of the corporation."

should have given her proposed instruction based on RCW 18.86.090 and .100, which limit a principal's vicarious liability and imputed knowledge in the context of brokerage relationships.[44] Wang maintains that these instructional errors effectively allowed BPS to impute Plager's possible knowledge of the existence of other inspection reports to Wang.[45]

Wang's concern is misplaced. The jury decided only one claim, Wang's allegation that BPS breached its contractual disclosure obligations. Her knowledge, imputed or actual, had nothing to do with BPS's compliance with these obligations. Either BPS complied with the terms of the PSA by making the documents available or it did not. The trial judge recognized this when he explained his reason for rejecting an RCW 18.86.090 and .100 instruction, "I concluded that I didn't need to give the instruction because it was a breach of contract issue, and BPS either did or did not perform under the contract. . . . If it didn't happen, it's BPS's fault." We agree. Wang has not shown that this alleged instructional error prejudiced or could have prejudiced her.

Wang also claims that the trial court impermissibly commented on the evidence by informing the jury in instruction 7 that it had dismissed her negligent

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[44] RCW 18.86.090 (1)(a) provides that a "principal is not liable for an act, error, or omission by an agent . . . [u]nless the principal participated in or authorized the act, error, or omission." RCW 18.86.100(1) states, "Unless otherwise agreed to in writing, a principal does not have knowledge or notice of any facts known by an agent . . . that are not actually known by the principal."

[45] There is some uncertainty in the record about whether Plager knew additional inspection reports were available for review. Without deciding, we will assume, as Wang now contends, that Plager knew that there were other materials available at the property manager's office and/or listing agent's office.

misrepresentation claims. According to Wang, the negligent misrepresentation claims were so closely linked to the breach of contract claim that informing the jury of the dismissal constituted a comment on the weakness of the contract claim.

Absent evidence to the contrary, juries are presumed to follow the trial courts instructions.[46] Here, instruction 7 informed the jury that

> The Court has dismissed the negligent misrepresentation claims . . . . The only remaining claim in this lawsuit is the breach of contract claim against Business Plans and Strategies, Inc., the seller of the building.
>
> During your deliberations on the breach of contract claim, you should not consider, and your deliberations should not be impacted by the fact that the other claims and defendants have been dismissed from this lawsuit.

Wang points to no evidence that members of the jury disregarded this directive. Thus, we presume that the jury ignored the dismissal of the tort claims when rendering its verdict.

Wang's third alleged instructional error is that the court erred in giving instruction 11 and refusing to give her proposed instruction 22A.[47] She fails,

[46] State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998).

[47] Instruction 11 read, "The failure to perform fully a contractual duty when it is due is a breach of contract. The duties at issue are the defendant's duties under Paragraph 5 (a) and Paragraph 12 of the Real Estate Purchase and Sale Agreement." Proposed instruction 22A stated,

> The failure to perform fully a contractual duty when it is due is a breach of contract. The duties at issue in this case are defendant's duty to make available all documents in seller's possession or control relating to the property and deliver all material documents in seller's possession or control relating to the condition of the building in accordance with the parties' contract, defendant's duty

however, to support this alleged error with argument. Nowhere in her brief does she explain how instruction 11 led to jury confusion, misstated the law, or prevented her from arguing her theory of the case. Because a party abandons assignments of error unsupported by argument,[48] Wang has abandoned this claim. Similarly she abandoned her challenge to the trial court's denial of her motion for a new trial as it, too, is unsupported by argument.

*Attorney Fees*

Finally, Wang challenges the trial court's award of attorney fees to BPS. Again, we disagree.

Attorney fees may be awarded when authorized by a contract, statute, or recognized ground in equity.[49] The PSA provided, "If Buyer or Seller institutes a suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses. In the event of trial, the amount of the attorney's fees shall be fixed by the court." Wang's cause of action arose from the PSA contract. In her complaint, she stated, "The acts and omissions of defendants . . . constitute a breach of their contractual obligation to plaintiffs under the Purchase & Sale Agreement." Accordingly, BPS, as the prevailing

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to disclose in writing information about concealed material defects in accordance with the contract, and defendant's duty of good faith and fair dealing.

[48] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (assignments of error unsupported by reference to the record or argument will not be considered on appeal).

[49] Fisher Props., Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986).

party, is entitled to reasonable fees and costs under the contract. And since Wang does not challenge the reasonableness of the award, we will not disturb it on appeal.

BPS asks for attorney fees on appeal based upon the PSA. A party is entitled to attorney fees on appeal if a contract, statute, or recognized ground of equity permits recovery of attorney fees at trial and the party asking for fees is the prevailing party.[50] Because BPS is the prevailing party in this lawsuit, we grant BPS's request for attorney fees, subject to its compliance with RAP 18.1(d).

CONCLUSION

We reject Wang's arguments, affirm, and award BPS its costs and attorney fees on appeal.

WE CONCUR:

Leach, A.C.J.

[50] Hwang v. McMahill, 103 Wn. App. 945, 954, 15 P.3d 172 (2000).